(2)

No. 09-944

Supreme Court, U.S.
FILED
MAR 18 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,
PETITIONERS

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NEIL PECK
Snell & Wilmer, L.L.P.
1200 17th Street
Suite 1900
Denver, CO 80202
(303) 634-2000

PATRICK G. BYRNE
Snell & Wilmer, L.L.P.
3883 Howard Hughes Pkwy
Suite 1100
Las Vegas, NV 89169
(702) 784-5500

JAMES D. MCCARTHY
Counsel of Record
WALTER J. SCOTT, JR.
MICHAEL S. TRUESDALE
DAVID H. AMMONS
Diamond McCarthy LLP
1201 Elm Street
Suite 3400
Dallas, TX 75270
(214) 389-5300

BURBY & TAYLOR • 800-368-4141

COUNTER QUESTIONS PRESENTED

1. Whether the Ninth Circuit and the District Court decided the issues before them in a manner consistent with this Court's holdings in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 589 U.S. 422 (2007).

2. Whether the Ninth Circuit correctly held that the federal courts lack subject matter jurisdiction over this matter.

TABLE OF CONTENTS

Page

COUNTER QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER STATEMENT 2

REASONS FOR DENYING THE PETITION 13

CONCLUSION 37

APPENDIX

District Court Order (11/6/2006) 1b

Barrick's Ninth Circuit Response Brief Excerpts 10b

TABLE OF AUTHORITIES

Page

CASES

AL GASIM OBIED IBRAHIM MOHAMMAD V. AIRBUS, S.A.S., NO. 09 CV 1817, 2009 WL 3807090 (N.D. ILL. NOV. 10, 2009) 35
DOLE FOOD CO. V. PATRICKSON, 530 U.S. 468 (2003) 30
MALAYSIA INTERNATIONAL SHIPPING CORP. V. SINOCHEM INTERNATIONAL CO., LTD., 436 F.3D 349 (3D CIR. 2006) 19
MORRISON V. ALLSTATE INDEM. CO., 228 F.3D 1255 (11TH CIR. 2000) 5
PATRICKSON V. DOLE FOOD COMPANY, INC., CIV.NO. 97 01516 HG (D. HAW. SEPT 9, 1998) 28
PATRICKSON V. DOLE FOOD CO., 251 F.3D 795 (9TH CIR. 2001) 6, 28, 29, 30
PATRICKSON V. DOLE FOOD CO., 538 U.S. 468 (2003) 28
PEREZ V. AT&T CO., 139 F.3D 1368 (11TH CIR. 1998) 2
REPUBLIC OF THE PHILIPPINES V. MARCOS, 806 F.2D 344 (2D CIR. 1986) 2, 34
REPUBLIC OF THE PHILIPPINES V. MARCOS, 863 F.2D 1355 (9TH CIR. 1988) (EN BANC) 12
RIVET V. REGIONS BANK OF LOUISIANA, 522 U.S. 470 (1998) 10
RUHRGAS, AG V. MARATHON OIL CO., 526 U.S. 574 (1999) 17, 19
SINOCHEM INTERNATIONAL CO., LTD. V. MALAYSIA INTERNATIONAL SHIPPING CORP., 2006 WL 2056376 (JULY 21, 2006) 19
SINOCHEM INTERNATIONAL CO., LTD. V. MALAYSIA INTERNATIONAL SHIPPING CORP., 549 U.S. 422 (2007) ..... *passim*
SOSA V. ALVAREZ-MACHAIN, 542 U.S. 692 (2004) 29
STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT, 523 U.S. 83 (1998) 14
TORRES V. SOUTHERN PERU COPPER CORPORATION, 113 F.3D 540 (5TH CIR. 1997) 2, 34

W.S. KIRKPATRICK & CO. v. ENVIRONMENTAL TECTONICS CORP., 493 U.S. 400 (1990) 10

STATUTES

28 U.S.C. § 1251(b)(1) 29
28 U.S.C. §§ 1332(a)(2)(3) & 1333 29
28 U.S.C. §§ 1364 & 1368 29

RULES

Supreme Court Rule 10 36

COUNTER STATEMENT

Petitioners Placer Dome, Inc. and Barrick Gold Corporation (collectively, "Barrick") argue that this Court must issue the writ to: (1) remedy an alleged affront to this Court's *Sinochem* decision; and (2) resolve an alleged circuit split regarding the scope of the federal common law of foreign relations. The latter would be accomplished by expanding the federal courts' jurisdiction over cases allegedly premised on the "federal common law of foreign relations" – so as to cover cases, like this one, where nothing on the face of the complaint indicates anything implicating U.S. foreign policy.

Barrick's first argument fails because *Sinochem* does not even apply to this case, where the District Court incorrectly decided the subject matter jurisdiction question in the affirmative before proceeding to consider other grounds for dismissal. Furthermore, the record clearly discloses that both the District Court and the Court of Appeals conducted themselves in accordance with *Sinochem*, and with due respect for and attention to the principles underpinning that decision. Barrick is simply unhappy with the outcome.

Barrick's second argument fails because it was not raised in the lower courts, where Barrick instead attempted to ground its claim to federal jurisdiction in the act of state doctrine. Because Barrick never argued that the federal common law of foreign relations provided jurisdiction, the District Court conducted none of the necessary fact finding to establish

jurisdiction on that basis.[1] In any event, Barrick's claim to jurisdiction would fail under any of the cases it alleges as creating a split between the courts of appeals.

For the reasons set forth below, neither argument warrants any further attention by this Court.

A. FACTUAL BACKGROUND.

Marinduque is a small island province in the Republic of the Philippines.[2] Its inhabitants are some of the most impoverished in the Philippines and depend for survival on subsistence agriculture, animal husbandry, and fishing.[3] Marinduque also has substantial and largely untapped mineral resources, including copper and gold deposits. That mineral wealth has been both a blessing and a curse.

---

[1] This newly discovered "split" of authority is allegedly between the Ninth Circuit and the Second, Fifth, and Eleventh Circuits – represented respectively by the decisions in *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *Torres v. Southern Peru Copper Corporation*, 113 F.3d 540 (5th Cir. 1997) and *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998). It is symptomatic of the argument that Barrick brought only one of these cases to the Court of Appeals' attention – the *Marcos* case – and that mention was made solely to make a point about President Marcos, and not to advise the Court of Appeals of the inter-circuit controversy over the scope of the federal common law of foreign relations that Barrick now claims.

[2] Pet. App. at 113a.

[3] *Id.* at 114a.

Petitioner Placer Dome, Inc. (now Barrick) managed and controlled various open pit mining operations on Marinduque for almost thirty years.[4] During that period, Placer Dome severely polluted the land and waters of Marinduque, and damaged the health of its residents, through the systematic dumping of hundreds of millions of tons of toxic waste into Calancan Bay and through both steady and precipitous releases of hundreds of millions of tons of toxic mine tailings into the inland waters of the island.

As a result of the last and most cataclysmic of these toxic floods, this one in the Boac River Valley, Placer Dome's resident managers were placed under arrest and all mining operations in Marinduque came to a halt. However, on the basis of written promises by the President of Placer Dome that it would resolve the problems caused by these mining disasters through a program of remediation and compensation, the resident managers were released.

Nevertheless, shortly thereafter, Placer Dome divested itself of its Philippine operations, and it, its resident managers – and even the insurance money relating to the Boac River disaster – departed the island. The mines have never been re-opened. The environmental, economic, and public health damage to the island and its people has never been remedied.

Since 1997, the Philippine authorities and the Marinduqueño people have sought to hold Placer Dome and subsequently Barrick accountable for its actions on the island. However, every public and private effort to

[4] *See, e.g.*, Pet. App. at 23a.

seek a remedy in the Philippines has been thwarted by Placer Dome's departure, by Placer Dome/Barrick's refusals to return, and even by their in-court denials that Placer Dome was ever there.

In consequence, nearly five years ago, the Province of Marinduque pursued Placer Dome/Barrick to Nevada, the operational center of Barrick's worldwide operations, and brought suit there, in a state court of general jurisdiction, on behalf of itself and its people. For each of those five years, Barrick has placed one procedural obstacle after another in the way of a resolution on the merits. The Barrick petition for certiorari is only the latest such effort.

B. THE PROCEEDINGS BELOW.

1. *Proceedings In The District Court.*

When Barrick removed the case to federal court for the District of Nevada, it based its removal on federal question jurisdiction, alleging that the case gave rise to questions of international law and foreign relations and therefore that it raised a "federal question."[5]

Initially, the Province took no position on that removal, as it was content to litigate the case either in federal or state court in Nevada. The Province only sought to have the jurisdictional issue resolved when it appeared that an already suspect removal was just the prelude to further delay and forum shopping. To avoid

[5] Pet. App. at 4a.

that result, and to obtain a jurisdictional ruling from the court that would fix the forum once and for all, the Province moved for an order requiring Barrick to show cause why the matter should not be remanded to state court for lack of subject matter jurisdiction.[6]

By way of an order not contained in Barrick's Appendix, the District Court denied the motion to show cause. It observed that, under Barrick's theory and the authorities relied upon, the court "must determine that the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principal of international law before it can assert jurisdiction."[7]

The District Court then analyzed those allegations in the complaint concerning actions taken by the Philippine government, and concluded that "Plaintiff's Complaint is replete with allegations

[6] In its petition, Barrick insinuates from the show cause and other related filings that the Province agreed that the District Court had subject matter jurisdiction. Pet. at 24. Setting aside the fact that parties may not confer subject matter jurisdiction by agreement, *see, e.g.*, *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000), Barrick misinterprets the Province's filings. First, the Province's November 7, 2005 statement in respect of removal, Pet. App. at 82a-85a, is not a concession regarding the propriety of federal subject matter jurisdiction. Rather, by way of the pleading the Province recognized that, in certain cases, jurisdiction may be based on the federal common law of foreign relations, but questioned whether that theory had any application, given the facts of this case. Pet. App. at 83a-84a. Second, the Province's April 9, 2006 reply in support of its motion to show cause took the ultimate position that no foreign relations jurisdiction arose in this case, and that a remand to state court would be required.

[7] Resp. App. at 7b.

regarding the Philippine Government's activities, which contributed to the environmental harm that Plaintiff has suffered."[8] Based upon that (incorrect) assessment, the District Court concluded that "[b]ecause the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state, this Court has federal question jurisdiction over this action."[9]

Once the District Court denied the requested remand for lack of subject matter jurisdiction, Barrick pressed its efforts to dismiss the Province's case on lack of personal jurisdiction and *forum non conveniens* grounds. That was so despite Barrick's extensive presence in Nevada, and despite Barrick's long-time involvement in the Philippines (the situs of events for virtually all of the relevant acts). Remarkably, Barrick's *forum non conveniens* motion sought to have the case dismissed in favor of a Vancouver, British Columbia forum.

While the parties were preparing to conduct discovery regarding the personal jurisdiction issues, this Court handed down its decision in *Sinochem*. In response, the District Court stayed the pending discovery in order to consider the *forum non conveniens* issue, and Barrick dropped its personal

---

[8] *Id.*

[9] *Id.* (citing *Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9th Cir. 2001)). The District Court's opinion did not address any aspect of the alleged federal common law of foreign relations other than the act of state doctrine, or note any facts in the case that would support any other federal common law of foreign relations theory not involving the act of state doctrine.

jurisdiction motion in favor of a new motion (with new affidavits) directed only to the *forum non conveniens* issue. The Province argued that the *Gilbert* factors favored Nevada, but, in the alternative, that the Philippines should be considered as the proper forum. The Province also argued that the District Court should condition any dismissal on Barrick's consent to litigate this case in the Philippines.

However, the District Court dismissed the case on *forum non conveniens* grounds in favor of a British Columbia forum.[10] In addressing the *forum non conveniens* issue, the District Court considered the forum in which the plaintiff filed suit (Nevada) and the forum proposed by the defendants (British Columbia), but expressly refused to consider the forum that constituted the location of all relevant events (the Philippines).[11]

The Province sought reconsideration, seeking a remand to state court based upon the absence of

[10] Pet. App. at 26a. In that order the District Court suggested that the existence of subject matter jurisdiction was still an open question before it. Moreover, despite its earlier subject matter jurisdiction ruling, the Court also noted that Barrick took the position at oral argument that no issues of American law were raised by the complaint or at issue in the case. *Id.* at 27a 28a. Given that contradiction between Barrick's oral argument statements and its briefing in favor of "federal question" jurisdiction, the Province's motion for reconsideration was inevitable. *Id.* at 28a.

[11] *Id.* at 59a-60a. Though most of the *Gilbert* factors favored the retention of the Nevada forum (as between Nevada and British Columbia), the Court granted dismissal on *forum non conveniens* grounds in favor of British Columbia.

subject matter jurisdiction as well as the reversal of the *forum non conveniens* dismissal.[12] In response, the District Court recognized the confusion created by its dismissal order, but explained that its dismissal order "should not be understood as a determination by this Court that it lacks subject matter jurisdiction," and then concluded "as it did before, that subject matter jurisdiction does, in fact, exist in this case, based upon the act of state doctrine."[13] It then explained that its subject matter jurisdiction ruling did not prevent it from dismissing on *forum non conveniens* grounds without first deciding *personal* jurisdiction.[14]

At no time did the District Court conduct any fact-finding with regard to the practical effect of the Province's complaint upon foreign relations between the United States and the Philippines, nor did the District Court (or Barrick) seek any briefing or other intervention from the governments of the Philippines or the United States.

Thus, in two separate rulings, the District Court assumed subject matter jurisdiction on the theory that the case invoked federal question jurisdiction under the act of state doctrine. In neither instance did the court

[12] *See id.* at 62a.

[13] *Id.* at 63a-64a.

[14] *Id.* at 64a. Of course, Barrick had already abandoned its personal jurisdiction motion by then, and neither party was insisting that any personal jurisdiction issues be decided before the *forum non conveniens* issue was decided.

assume federal question jurisdiction under the related "federal common law of foreign relations."

2. *Proceedings In The Court Of Appeals.*

On appeal, Barrick attempted to argue, first, that the District Court had not really decided subject matter jurisdiction.[15] The Court of Appeals quickly rejected that position, explaining that the District Court had twice confirmed its finding of subject matter jurisdiction – first in its order denying the motion to show cause and then in its order on reconsideration of the dismissal.[16] As the Court of Appeals put it, Barrick was "misapprehending" the proceedings below; and it was "abundantly clear that the District Court concluded it had subject matter jurisdiction over this suit."[17]

Having established that the District Court had decided that it had subject matter jurisdiction before dismissing on *forum non conveniens* grounds, the Court of Appeals then assessed the effect of *Sinochem* on its own analysis. As a result of that effort, it concluded that *Sinochem* did not bar its review of the

---

[15] *See* Resp. App. at 10b (suggesting falsely that: "In short, after the Supreme Court decided *Sinochem*, the district court never wavered from its view that it could dismiss this case on *forum non conveniens* grounds without deciding subject matter jurisdiction.").

[16] Pet. App. at 8a. Barrick nevertheless asserts the same wholly counterfactual position here. Pet. at 3, 12-13.

[17] Pet. App. at 8a.

District Court's jurisdictional ruling,[18] especially because "the question of subject-matter jurisdiction here is not particularly complex."[19]

In addressing the basis on which Barrick had asserted its claim to subject matter jurisdiction below – the alleged presence of act of state issues – the Court of Appeals explained first that the act of state doctrine "precludes courts from evaluating the validity of actions that a foreign government has taken within its own borders"[20] and, second, that "[a]ct of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine."[21]

The Court of Appeals also explained that such a determination depends exclusively on the content of the complaint. That was so because "the presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule' – which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[22]

---

[18] *Id.* at 10a.

[19] *Id.*

[20] *Id.* (citations omitted).

[21] *Id.* at 12a (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (emphasis in original)).

[22] *Id.* at 16a (quoting *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998)).

Within that analytical framework, the Court of Appeals then reviewed the allegations contained in the Province's complaint, only to conclude that none of the supposed acts of state identified by the District Court were essential elements of the Province's claims."[23]

In reaching that conclusion, the Court of Appeals explained that:

> to prove that Barrick violated the various provisions of Philippine law that the Province sued under, such as reckless and simple imprudence, the Province need not prove the validity or invalidity of an act of state. For example, proving that Barrick was reckless when it hastily built the Maguila-Guila dam, which allegedly collapsed only two years after being built, does not implicate, let alone require, any act of state. Rather, invocation of the act of state doctrine here would be via Barrick's defenses to the Province's claims and as such cannot support removal jurisdiction.[24]

Finally, the Court of Appeals noted that none of the policy considerations underlying the act of state doctrine were implicated by the Province's claims.

More specifically, the Court of Appeals observed that, because any issues involving the corrupt actions of former President Ferdinand Marcos were not likely to

[23] *Id.* at 17a.

[24] *Id.* at 18a.

impact current foreign relations, there was no justification for leaving such issues within the exclusive realm of the political branches.[25] Such foreign policy concerns were especially unlikely to be implicated, the Court of Appeals further explained, when the current Philippine government has also repudiated and openly condemned the conduct of its past president.[26] As the Court summed it up, "the parties' dispute as framed by the complaint does not require us to pass on the validity of the Philippines' governmental actions."[27]

Based on its analysis of the unique facts in the complaint, the panel therefore concluded, correctly, that because the Province's complaint did not raise a federal question under the act of state doctrine, the District Court was without jurisdiction.[28] Accordingly, the Court of Appeals found Barrick's removal improper, reversed the District Court's rulings, and remanded the case with instructions that the District Court remand the case to state court.[29]

---

[25] *Id.* at 19a-20a (quoting *Sabbatino*, 376 U.S. at 428).

[26] *Id.* at 20a (citing *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (en banc) for the proposition that "when a ruler's former domain has turned against him and seeks the recovery of what it claims he has stolen, the classification [of Marcos's past acts as 'acts of state'] has little or no applicability.")

[27] *Id.*

[28] *Id.* at 20a-21a.

[29] *Id.* at 21a. Barrick's attempt to obtain a panel rehearing and/or a rehearing *en banc* also failed, and an order denying those rehearing petitions was entered on November 12, 2009. *See id.* at 74a.

REASONS FOR DENYING THE PETITION.

A. THE COURTS BELOW DECIDED THE ISSUES BEFORE THEM IN ACCORDANCE WITH THIS COURT'S RULINGS IN *SINOCHEM* AND RELATED CASES.

Barrick's first argument is that the Court of Appeals so egregiously affronted the letter and spirit of this Court's holdings in *Sinochem International Col, Ltd. v. Malaysia International Shipping Corp.*[30] that this Court must grant *certiorari* to save its *Sinochem* opinion.[31] Barrick can only make that argument by mischaracterizing -- in order – *Sinochem*, the decisions of the District Court, and the holdings of the Court of Appeals.

[30] 549 U.S. 422 (2007).

[31] The only specific claim made in Barrick's first argument is that the Court of Appeals' decision improperly restricted the discretion that *Sinochem* granted to the district and appellate courts. *See* Pet. at 1, 2-3, 11-14. That argument is addressed at pp. 23-25, *infra*. Another part of Barrick's first question asks whether the Ninth Circuit applied an incorrect standard of review. However, the petition does not thereafter explain why the well-settled rule that a district court decision regarding subject matter jurisdiction is reviewed *de novo* is no longer applicable. Nor does it identify any standard that should have been employed by the Ninth Circuit in lieu of the *de novo* standard of review that actually was employed. Pet. App. at 7a. As Barrick offers no argument in support of this sub-issue, it cannot and need not be addressed further.

I. The *Sinochem* Decision.

a. Steel Co. And The Problem of Hypothetical Jurisdiction.

This Court's *Sinochem* opinion is one of a sequence in which this Court has wrestled with the tensions between assuring that its powers to adjudicate cases and controversies were not extended beyond their constitutional and statutory boundaries, and the practical problems that arise when a relatively simple route to the resolution of a case, even a resolution on the merits, is blocked by the real or perceived need to decide the jurisdictional issue first.

That tension has always been present in the federal courts, but its modern discussion began with this Court's decision in *Steel Co. v. Citizens for a Better Environment* ("*Steel Co.*").[32] As the *Sinochem* Court itself clearly understood, the holdings of *Sinochem* cannot be understood without reference to the *Steel Co.* decision and its progeny.[33]

In *Steel Co.*, this Court weighed in on the potential evils of what it called the "doctrine of hypothetical jurisdiction," by which the federal courts had become, in the *Steel Co.* majority's view, too facile in "'assuming' jurisdiction for the purpose of deciding the merits."[34] And while this Court unanimously

[32] 523 U.S. 83 (1998).

[33] *Sinochem*, 549 U.S. at 430-431.

[34] *Steel Co.*, 523 U.S. at 93-94.

agreed that jurisdiction was lacking in the particular case before the *Steel Co.* Court, and that the jurisdictional issue should have been decided before proceeding to the merits, the *Steel Co.* Court was not agreed as to the necessity of a federal court determining its own jurisdiction – before proceeding onward – in all cases.

The *Steel Co.* majority view was clear, however. Even as it conceded that the Court's own record in such matters was somewhat spotty, and that there were exceptions to the general rule, the majority insisted on an antecedent determination of subject matter jurisdiction.[35]

> While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. . . . Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even

[35] *Id.* at 101 (internal citations omitted).

> restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

The four *Steel Co.* concurring opinions were far less absolute in their approach to the sequencing of judicial decision-making in the face of jurisdictional questions. Justice Breyer's concurrence was representative of this view:[36]

> . . . federal courts often, and typically should, decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business. But my qualifying words "often" and "typically" are important. The Constitution, in my view, does not require us to replace those words with the word "always." The Constitution does not impose a rigid judicial "order of operations," when doing so would cause serious practical problems.

b. Ruhrgas and Sinochem.

Steel Co. remains good law, and its general rule that jurisdictional issues should be resolved first, before addressing the merits, remains vital today. However,

---

[36] *Id.* at 111 (Breyer, J. concurring).

the tension between good Constitutional and statutory form and the need for practical case analysis has not disappeared in the interim, with the result that exceptions to the general rule of *Steel Co.* have also been recognized during that same period. That has been especially true where the Court is not contemplating a disposition on the merits, but addressing what is generally denominated as a threshold issue.

In the *Ruhrgas* case,[37] for instance, this Court held that a district court could, in at least some circumstances, dismiss a case for lack of personal jurisdiction without first undertaking an analysis of its subject matter jurisdiction. In *Sinochem*, of course, this Court held that, in at least some circumstances, a district court could dismiss a case on *forum non conveniens* grounds, without first establishing its subject matter jurisdiction.

But neither *Ruhrgas* nor *Sinochem* converted a district court's early decision on subject matter jurisdiction to a "discretionary" decision. To the extent a district court has discretion, it is to pass on a difficult and complex question of subject matter jurisdiction in favor of an easier path to dismissal. But if – as here – a district court in fact rules on a subject matter jurisdiction question that is not complex or difficult prior to considering alternative grounds for dismissal, that ruling is subject to *de novo* review. Nothing in *Ruhrgas* or *Sinochem* cast any doubt on that well-established rule.

---

[37] *Ruhrgas, AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

Furthermore, in neither of these cases did the unanimous court that issued them give wholly unlimited discretion to the district courts. In the *Ruhrgas* case, the Court concluded its opinion with an important limitation:[38]

> [W]e recognize that in most instances subject matter jurisdiction will involve no arduous inquiry. . . . In such cases, both expedition and sensitivity to state courts' coequal stature should compel the district court to dispose of that issue first. . . . Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex issue of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.

Sinochem also concluded with a similar cautionary limitation that, like *Ruhrgas*, paid homage to *Steel Co.'s* holding that "jurisdictional questions ordinarily must precede merits determinations in dispositional order."[39] More specifically, after noting that *Sinochem's* unique facts made it "a textbook case

[38] *Id.* at 587-588.

[39] *Sinochem*, 549 U.S. at 431.

for immediate *forum non conveniens* dismissal,"[40] Justice Ginsburg, writing for a unanimous court, held:[41]

> If, however, a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. In the mine run of cases, jurisdiction "will involve no arduous inquiry" and both judicial economy and the consideration ordinarily accorded to the plaintiff's choice of forum 'should impel the federal court to dispose of [those] issue[s] first. . . . But where subject matter or personal jurisdiction is difficult to determine, and *forum non conveniens* consideration weigh heavily in favor of dismissal, the court properly takes the less burdensome course.

These limitations on the discretion that *Sinochem* afforded to the district courts are important parts of that opinion, and of a body of jurisprudence this Court has evolved to balance its concerns for the proper exercise of judicial power against the practical needs of

---

[40] *Id.* at 435 (citations omitted; quoting *Ruhrgas*, 526 U.S. at 587-88).

[41] *Sinochem*, 549 U.S. at 436. Note that *Sinochem's* comments *as to subject matter jurisdiction* were *dicta* because both lower courts in the *Sinochem* case had found admiralty or maritime jurisdiction over the matter, *see Malaysia International Shipping Corp. v. Sinochem International Co., Ltd.*, 436 F.3d 349, 354-58 (3d Cir. 2006), and that subject matter jurisdiction decision was not appealed to the Supreme Court. *See Sinochem*, 127 S. Ct. at 1190. *See also* the *Sinochem* petition for *certiorari* at 2006 WL 2056376 (July 21, 2006).

court administration. Furthermore, nothing in *Sinochem* or its progeny offered district courts the discretion to simply "assume" subject matter jurisdiction for a case removed from state court in order to reach an alternate ground for dismissal that would not result in a remand back to that state court.

Yet the fundamental tenet upon which Barrick grounds its *Sinochem* argument is the perception that these cautionary notes can be read out of the *Sinochem* decision, and ignored, and that *Sinochem* can be interpreted to re-embrace an untrammeled discretion to ignore the jurisdictional issues – *i.e.*, a new era of "hypothetical jurisdiction." Only then, if *Sinochem* is so misinterpreted, can Barrick argue that the courts below contravened *Sinochem*.

In fact, the reverse is true. When it came to the actual sequence of judicial decision-making employed in this case by both the District Court and the Court of Appeals – deciding subject matter jurisdiction before deciding *forum non conveniens* issues – both courts were wholly in sync with *Sinochem*. The fact that the District Court erred in its analysis of the subject matter jurisdiction issues did not change the propriety of that court's sequencing of the issue. The subject matter jurisdiction error could be, and was, independently cured on appeal.

2. The District Court's Fidelity to *Sinochem*.

The procedural history in the District Court shows that this case simply is not postured in the

manner for further review, and there is no basis for a writ to be issued.

In this case, the District Court ruled on subject matter jurisdiction by concluding that such jurisdiction existed here on act of state grounds. After making that ruling, the District Court lacked any *Sinochem* discretion to simply pass on the question of subject matter jurisdiction, as that would require the court to pretend that it had not considered the question. Thus, in this case, *Sinochem* was never even implicated.

Even if *Sinochem* had somehow provided the District Court with the discretion to avoid the consequences of its earlier subject matter jurisdiction decision - which, if it had been decided correctly would have resulted in a remand to state court long before the *forum non conveniens* question was ever reached, Sinochem itself would block any exercise of that discretion. That is so because *Sinochem* limits a court's ability to decide a *forum non conveniens* motion (before deciding subject matter jurisdiction) to that class of cases "where subject matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal."[42]

Indeed, the subject matter jurisdiction question in this case was not difficult to determine.[43] This case was the usual one in which "a court can readily determine that it lacks jurisdiction over the cause or

---

[42] *Sinochem*, 549 U.S. at 436.

[43] As the Court of Appeals put it, "the question of subject matter jurisdiction here is not particularly complex." Pet App. at 10a.

the defendant [and therefore one in which] the proper course would be to dismiss on that ground."[44] As the *Sinochem* Court also wrote, "in the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of those issues first."[45]

No "arduous inquiry" was required here.[46] The District Court only needed to: (1) read the Province's well-pleaded complaint; and (2) on the basis of that reading determine that the Province's assertion of Philippine law claims against two private multinationals operationally centered in Nevada did not depend on the resolution of a substantial question of the federal common law of U.S. foreign relations or require a decision on a matter properly considered to be an act of state.

Accordingly, even under *Sinochem*, **this** district court was obliged to address **this** subject matter jurisdiction issue in **this** case before addressing *forum non conveniens*. To be sure, to the extent it did base its subject matter jurisdiction ruling on an erroneous analysis of the act of state doctrine, it did err. Where it

---

[44] *Sinochem*, 549 U.S. at 436.

[45] *Id.*

[46] The *forum non conveniens* factors also did not "weigh heavily" in favor of a Vancouver forum. As to the latter, the District Court found only two of thirteen *Gilbert* factors favoring Vancouver and neither actually favored that forum. Moreover, if the District Court had not arbitrarily refused to even consider a Philippine forum, none of those factors would have favored Vancouver.

did *not* err was in deciding the subject matter jurisdiction issue first. In that respect, the District Court, writing both before and after *Sinochem*, was wholly faithful to *Sinochem*.

3. The Court of Appeals' Fidelity to *Sinochem*.

The premises for Barrick's *Sinochem*-based argument against the Court of Appeals' decision are that the Court of Appeals was somehow obliged, by *Sinochem*, to ignore the fact that the District Court had decided the subject matter jurisdiction question before it decided the *forum non conveniens* question and also to ignore the fact that the District Court had decided it incorrectly – all in order to uphold an appallingly incorrect *forum non conveniens* decision that the District Court should never have reached or made.

Nothing in *Sinochem* supports this argument. To the contrary, because the District Court reviewed subject matter jurisdiction first, wholly consistent with *Sinochem*,[47] there was no *Sinochem* sequencing issue for the Court of Appeals to review. For the same reason, there is no anti-sequencing ruling by the Court of Appeals that this Court must now review and "cure."[48]

---

[47] The Province certainly did not contest the District Court's right to review the questions before it in that order. Neither did Barrick – until after the fatal errors in the District Court's subject matter analysis had been exposed. And even then Barrick's response was not to challenge the District Court's actual decision-making sequence, but to pretend that it had never happened.

[48] Barrick asks this Court to grant certiorari in order to "make

The only issue that could be properly before this Court then is whether a Court of Appeals has the authority, post-*Sinochem*, to reverse a district court's erroneous holding that it had subject matter jurisdiction over that action. Of course, the general duty of appellate courts in such matters is well established. As this Court noted in *Steel Co.*:[9]

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

---

clear that the circuit courts should also have the discretion to address *forum non conveniens* issues before jurisdictional issues." Pet. App. at 12a. However, there is nothing in this case that suggests anything to the contrary. *Sinochem* clearly provides judicial discretion to take the "less burdensome course" to dismissal in most cases, *see Sinochem*, 549 U.S. at 436, and by addressing subject matter jurisdiction first, an issue the appellate court viewed as "not particularly complex," Pet. App. at 10a, the panel properly exercised the very discretion that Barrick now asks this Court to confirm.

[9] *Steel Co.*, 523 U.S. at 1013 (internal citations omitted).

Nothing in *Sinochem* can be read to have limited that duty, or the Court of Appeals' ability to perform it. *Sinochem* simply has nothing to say about the duties of appellate courts faced, as the Court of Appeals was, with an erroneous subject matter jurisdiction decision. It is hardly surprising then that the Court of Appeals, after closely reviewing *Sinochem*, found that "*Sinochem* presents no bar to our reaching the issue of whether the Province's allegations involve federal questions."[26]

There is no credible argument to the contrary, and Barrick does not offer one, or any authority that would support such an argument. The Court of Appeals, like the District Court below, had the discretion, under *Sinochem* and numerous other of this Court's precedents, to review and decide the subject matter jurisdiction issue first, before considering any *forum non conveniens* issues. When the Court of Appeals did exercise that discretion in that manner, it acted consistently with both the letter and the spirit of *Sinochem*.

4. Barrick's Sinochem Question Does Not Merit Certiorari.

As the foregoing discussion makes very clear, nothing in the Court of Appeals' analysis or application of *Sinochem* restricted the discretion that *Sinochem* granted to lower courts faced with both a *forum non conveniens* issue and a challenge to the court's subject matter jurisdiction.

---

[26] Pet. App. at 16a.

In fact, both the District Court and the Court of Appeals acted in a manner consistent with *Sinochem*, and exercised their discretion in a manner consistent with *Sinochem*, restricted only by that opinion's own limitations.

Barrick's real grievance is that those courts did not exercise that discretion in the manner it would have preferred. *Certiorari* is an inappropriate remedy for individual discontents of that sort, and Barrick's petition should be denied for that reason.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL COURTS DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS MATTER.

Barrick's second argument for certiorari is premised on the notions that: (1) the circuit courts of appeals are split as to the scope of the federal common law of foreign relations; (2) the Ninth Circuit Court of Appeals comes down on the wrong side of that split because its jurisdictional test is too restrictive;[5] and (3) (implicitly) a District Court applying standards other than those in effect in the Ninth Circuit would have held that it had jurisdiction over this matter.

[5] The Barrick question presented to this court on this point is: "Does federal question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint?" Pet. at i. Not surprisingly, since there are no substantial foreign policy concerns stated on the face of the Province's complaint (and the Court of Appeals so held), Barrick would answer its own question in the affirmative. Pet. at 14-25.

That argument fails for at least two reasons. First, that issue was not raised below, where Barrick relied on the act of state doctrine, not the federal common law of foreign relations, in its failed attempt to establish federal jurisdiction.[12] Because Barrick did not raise or develop a non-act of state argument below, the district court never conducted any fact-finding on whether the Province's case implicates the foreign relations between the Philippines and the United States.

Second, under any circuit's analysis of the jurisdictional implications of the federal common law of foreign relations and/or the act of state doctrine, the Court of Appeals properly dismissed this case for lack of federal subject matter jurisdiction.

I. Barrick's Newfound (And Misplaced) Reliance On The Federal Common Law Of Foreign Relations As A Basis For Subject Matter Jurisdiction.

a. The Patrickson Framework Governing This Case.

The nation's leading case regarding the jurisdictional implications of the federal common law of foreign relations and the act of state doctrine is the Ninth Circuit's decision in *Patrickson v. Dole Food*

[12] Barrick never once mentioned the "circuit split" that now purports to concern it. *See* footnote 1, *supra*.

Co.,[53] a suit by a putative class of Latin American banana workers allegedly damaged by pesticides used by the multinational fruit companies that employed them.

Though the plaintiffs asserted no federal claims in that case, the defendants and third-party defendants removed it to federal district court in Hawaii, claiming that the court had jurisdiction based on the Foreign Sovereign Immunities Act ("FSIA") and the federal common law of foreign relations. The district court rejected the former argument (asserted by two third-party defendants formerly owned indirectly by the Israeli government), but found jurisdiction under a federal common law of foreign relations theory.[54]

On appeal, the Ninth Circuit addressed both of the defendants' theories of removal jurisdiction and found that there was no jurisdiction based on the federal common law of foreign relations, and no jurisdiction under FSIA. Accordingly, the Ninth Circuit ordered the case remanded to the Hawaii state court in which it arose.

For present purposes, it is important to note three aspects of the Ninth Circuit's rejection of Dole's federal common law of foreign relations theory of jurisdiction. First, the Ninth Circuit expressed its doubts as to the validity of the theory as a basis for

[53] 251 F.3d 795 (9th Cir. 2001), *aff'd in part, dism'd in part*, 538 U.S. 468 (2003).

[54] *Patrickson v. Dole Food Company, Inc.*, Civ.No. 97-01516-HG (D. Haw. Sept 9, 1998) DE No. 153 at pp. 5-29.4

federal jurisdiction, especially in light of all the statutory law already occupying the area.[55] Second, the Ninth Circuit did recognize that cases actually founded on act of state issues *could* give rise to federal jurisdiction, if that act of state were asserted "affirmatively as the basis of a claim."[56] Third, the Court of Appeals directly addressed and distinguished

---

[55] *Patrickson*, 251 F.3d at 803 (emphasis added) ("We see no reason to treat the federal common law of foreign relations any differently than other areas of federal law. Certainly federal courts have preminence in developing all areas of federal law by virtue of the fact that almost all cases premised on federal law may be brought in or removed to federal court. In addition, Congress has provided federal jurisdiction in certain cases implicating our foreign relations, regardless of the nature of the claim. *See, e.g.*, 28 U.S.C. § 1251(b)(1) (suits where ambassadors or their foreign government officials are parties); *id.* § 1351 (suits against foreign consuls or other diplomatic personnel); *id.* § 1330 (suits against a foreign state); *see also id.* § 1350 (suits brought by an alien for a tort committed in violation of international law. **What Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue. We interpret congressional silence outside these specific grants of jurisdiction as an endorsement of the well-pleaded complaint rule.").**

The Court of Appeals could also have pointed to numerous other federal jurisdictional statutes with international implications for, *inter alia*, foreign states or the citizens and subjects thereof. *See, e.g.*, 28 U.S.C. §§ 1332(a)(2)(3) & 1333; 28 U.S.C. §§ 1364 & 1368. Today, it is also likely that the Court of Appeals would point to this Court's numerous injunctions in the opinions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and other cases against the expansion of jurisdiction through the expansion of the federal common law.

[56] *Id.* at 806 n.2.

each of the cases from which Barrick now seeks to manufacture a "circuit split."[57]

The defendants and third-party defendants appealed the Ninth Circuit's decision to this Court separately, and this Court affirmed as to the FSIA issues. However, this Court did not address Dole's claim to jurisdiction premised on the federal common law of foreign relations for the simple reason that the Dole Defendants did not appeal it.[58] The remand order was therefore sustained, and the Ninth Circuit's detailed analysis of (and rejection of) Dole's federal common law of foreign relations claim remains the leading analysis of that theory of federal jurisdiction, as both the District Court and the Court of Appeals observed.

---

[57] As to *Marcos*, *see Patrickson*, 251 F.3d at 808 n.2, 801, 802, 803. As to *Torres*, *see id.* at 801, 803, 804 nn. 8, 9. As to *Pacheco de Perez*, *see id.* at 801, 803, 804 n.9.

[58] *Dole Food Co. v. Patrickson*, 530 U.S. 468, 474 & 480 (2003) ("Addressing the ground relied upon by the Dole petitioners, [the Court of Appeals] held removal could not rest on the federal common law of foreign relations". 251 F.3d 795, 800 (CA.9 2001). In this Court, the Dole petitioners did not seek review of that portion of the Court of Appeals' ruling, and we do not address it. Accordingly, the writ of certiorari in No. 01-593 is dismissed.").

b. Barrick's Response To The Patrickson Framework: Fleeing From The Act Of State Doctrine.

The existence of the *Patrickson* decision (and of the framework set forth therein) at the time Barrick removed this case to federal court is important. *Patrickson* not only provided a very well-known backdrop to any Barrick effort to claim federal court jurisdiction over this case, it also exposed the more problematic aspects of those cases on which Barrick now seeks to rely.

In those circumstances, it is instructive to note that Barrick chose, in the courts below, to make its case for jurisdiction almost entirely within the *Patrickson* framework – by attempting to argue that there were act of state issues in the case, and that they gave rise to federal jurisdiction. Of course, Barrick failed in that effort.

However, it is just as instructive to note what Barrick did not do in the face of its failures to achieve federal court jurisdiction within the *Patrickson* framework. It did not stress or argue or even mention the view of the federal common law of foreign relations supposedly memorialized in the *Marcos*, *Torres*, and *Pacheco de Perez* decisions. And it certainly made no effort to develop a factual record that would support the argument that Barrick now tries to make: that the Province's complaint must be handled by the federal courts because this case substantially affects the sovereign interests of the Philippines.

Of course, it is easy to see why there is no factual record in this case mirroring that in *Torres*. To obtain such a record, Barrick – the polluter of the Philippines – would have had to ask the government of the Philippines for affidavits and amicus briefs protesting the U.S. courts' efforts to bring long-delayed relief to one of its own provinces, and to hundreds of thousands of its own citizens, on the ludicrous ground that this action threatened the Philippines' sovereign interests. Not surprisingly, neither the District Court nor Barrick requested any such briefing from either the Philippines or the United States Government.

2. Barrick's Assertion Of Subject Matter Jurisdiction Over This Case Would Fail In Any Circuit.

Having failed to make out its act of state argument in the Court of Appeals, because "none of the supposed acts of state identified by the District Court is essential to the Province's claims,"[59] Barrick now recasts its argument to claim that federal question jurisdiction arises because the complaint substantially affects a foreign country's sovereign interests.[60] That is so though Barrick expressly took the position in the Court of Appeals that "Defendants have never contended that a U.S. federal court should assert

[59] Pet App. at 17a. Of course, it is important to note that the Court of Appeals did not identify a single act of state issue in this case – *i.e.*, it identified no government act of a sovereign state (the Philippines) taken within its own borders, on which the trial court or the jury in this case would actually have to pass judgment.

[60] Pet. at 4.

jurisdiction over the present case simply because a foreign government has an interest in the case."[61]

To give that new argument additional cachet in this Court, Barrick also suggests, for the first time, that "[t]here is a circuit split as to whether federal question jurisdiction is met in cases having important foreign policy implications even though not raised as an essential element of a cause of action."[62] The implicit argument is that if this Court should adopt those standards alleged to be on the other side of the split, Barrick would be able to sustain its claims to federal court jurisdiction.

Of course, no discussion of such split arose below because the Ninth Circuit was not asked to decide, and did not decide, the question of the effects of the Province's complaint – substantial or otherwise – on the Philippines' sovereign interests. More to the point, Barrick – which had the entire burden of establishing subject matter jurisdiction in the lower courts – offered neither argument nor proof that the Province's complaint substantially affects the sovereign interests of the Republic of the Philippines.

The Province's well-pleaded complaint describes an action between a Philippine sovereign that has voluntarily submitted itself to the Nevada courts and two multinational mining companies operationally centered in Nevada. The Province's complaint places

---

[61] Resp. App. at 10b.

[62] Pet. at 15.

Barrick and its misconduct, and not the conduct of the Philippine government, squarely at the center of the litigation. As a result, there is nothing in this case that would change if there were a genuine split between the circuits and this Court actually applied the *Marcos*, *Torres*, and *Pacheco de Perez* analyses to this case.

The *Marcos* case implicated U.S. foreign policy because a U.S court had to decide, as a necessary element of the plaintiff's case, "whether to honor the request of a foreign government . . . to freeze property in the United States subject to future process in the foreign state,"[63] as the Court of Appeals noted.[64] The Province's complaint raises no such question for a U.S. court.

The *Torres* case ostensibly implicated U.S. foreign policy because the Peruvian government had protested the lawsuit by filing a letter with the U.S. State Department and by submitting an amicus brief to the Fifth Circuit[65] and because the case concerned a "critical" industry within the Peruvian economy, which contributed up to 50% of its export income and 11% of its gross domestic product.[66]

Here, the Philippine national government has not protested this lawsuit by filing a letter with the

---

[63] 806 F.2d at 354.

[64] 582 F.3d at 1091 n.7.

[65] 113 F.3d at 542.

[66] *Id.* at 543.

U.S. State Department or filing an amicus brief with the Court of Appeals, and there is no evidence in the record regarding the role of the mining industry in the Philippine economy or regarding its particular contributions to export income or gross domestic product. Thus, even if *Torres* was good law,[67] and was applied here, the outcome would be no different.

Then there is the *Pacheco de Perez* case, in which the Eleventh Circuit Court of Appeals *rejected* AT&T's efforts to establish jurisdiction based upon a *Torres*-like[68] view of the federal common law of foreign relations. It did so because of the paucity of any record supporting AT&T's argument that its liability directly implicated Venezuela's sovereign rights. Barrick likewise would wholly fail to establish that proposition.

The most important distinguishing fact of the case at bar compared to all of the above cases is that the Province is **a Philippine sovereign state that brings this action, and that fact is hardly likely to occasion a protest from the Philippine government – let alone affidavits, letters, and amicus briefs memorializing that protest**. Without the foreign sovereign insisting that a United States court's

[67] There is some question as to whether *Torres* is even good law in the Fifth Circuit. *See Al Qasim Obied Ibrahim Mohammad v. Airbus, S.A.S.*, No. 09 cv 1817, 2009 WL 3807090, at *3 (N.D. Ill. Nov. 10, 2009).

[68] It is not at all clear, as Barrick suggests, that the Eleventh Circuit has adopted *Torres*' view of the issue. All that is clear is that AT&T had proposed and argued that view, and that the Eleventh Circuit found that AT&T fell far short of even AT&T's preferred jurisdictional standard.

jurisdiction over a case will implicate its foreign relations, Barrick could not have prevailed in obtaining subject matter jurisdiction in this case even if its new alternative theory was the law of the land.

C. THERE ARE NO "COMPELLING REASONS" FOR GRANTING THE WRIT OF CERTIORARI IN THIS CASE.

This Court's rules counsel every petitioner seeking certiorari that the petition "will be granted only for compelling reasons,"[69] and that the petitioner's argument in support of its petition must be made in those terms.[70] It is not surprising then that Barrick has attempted to couch its general discontents with the Ninth Circuit's rulings in the language of Supreme Court Rule 10.

What is surprising is that Barrick has done so by: (1) alleging that the Court of Appeals has affronted a Supreme Court decision (*Sinochem*); and (2) claiming that there is a split of authority relevant to this case regarding the scope of the federal common law of foreign relations at the Circuit Court level. As the foregoing shows, there is no basis for either claim.

The first claim is based on a studious re-writing of the facts and the law. The second is based, first, on a determined effort to ignore the record below and, second, on the rewriting of the relevant case law. As a

---

[69] *See* Supreme Court Rule 10.

[70] *Id.* at Rule 14.1(h).

result, it could not be clearer that there is no infidelity to *Sinochem* whatsoever, and that the alleged circuit split is either non-existent or, if it exists at all, irrelevant to this case and its outcome.

CONCLUSION

Because both of Barrick's arguments are contrived, and factually and legally flawed, neither offers a compelling reason for the grant of certiorari in this case. This Court should deny the petition.

Respectfully submitted,

James D. McCarthy
Counsel of Record

Walter J. Scott, Jr.
Michael S. Truesdale
David H. Ammons

DIAMOND McCARTHY LLP
1201 Elm Street,
Suite 3400
Dallas, Texas 75270
(214) 389-5300 - Telephone
(214) 389-5399 – Facsimile
sscott@diamondmccarthy.com
jmccarthy@diamondmccarthy.com
mtruesdale@diamondmccarthy.com
dammons@diamondmccarthy.com

Neil Peck

SNELL & WILMER L.L.P.
1200 17th Street,
Suite 1900

Denver, CO 80202
(303) 634-2000 – Telephone
(303) 634-2020 – Facsimile
npeck@swlaw.com

Patrick G. Byrne

SNELL & WILMER L.L.P.
3800 Howard Hughes Parkway
Suite 1000
Las Vegas, NV 89109
(702) 784-5500 – Telephone
(702) 784-5252 – Facsimile
pbyrne@swlaw.com

2:05-CV-1299-BES-RJJ
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROVINCIAL GOVERNMENT OF MARINDUQUE
Plaintiff,
v.
PLACER DOME, INC., Defendant.

ORDER

Currently before the Court is Plaintiff's Motion for Order Requiring Defendant to Show Cause Why This Action Should Not Be Remanded to State Court (#94), which was filed on March 17, 2006. Defendant filed a Response (#105) on April 4, 2006, and Plaintiff filed a Reply (#114) on April 19, 2006.

I. BACKGROUND

This matter arose from mining activities that occurred between 1964 and 1997 on the island of Marinduque, a small island province of the Philippines. The Court now recounts Plaintiff's allegations regarding these mining activities.

In the early 1950's, Placer Development began exploring, mapping, and drilling on Marinduque to determine the extent of natural mineral resources on the island. By 1956, Placer Development identified substantial amounts of copper on the slopes of Mount Taipan in Marinduque's north central highlands. This mining site, however, was located on a forest reserve, which was protected by Presidential proclamation. To sidestep this protection, Placer Development entered

into a secret agreement with Ferdinand Marcos, the newly elected President of the Philippines. Under this agreement, Placer Development gave Marcos a personal ownership interest in its subsidiary, Marcopper Mining Corporation ("Marcopper"), a Philippine corporation created solely to extract the copper and gold beneath the forest reserve.[1] In return, Marcos withdrew the forest reserve's protected status, thereby allowing Marcopper to commence mining.

Between 1964 and 1987, Placer Development, through its wholly owned subsidiary, Placer Copper Holdings ("Placer Copper"), controlled 39.9 percent of Marcopper's shares.[2] In 1987, Placer Development then merged with two other Canadian mining companies to form Defendant. After the merger, Defendant retained the 39.9 percent ownership interest in Marcopper. Through this ownership interest, Placer Development and, subsequently, Defendant were able to completely dominate Marcopper, making all of the managerial decisions regarding mining on Marinduque.

These managerial decisions included the decision to open the Tapian Pit in 1969. To facilitate mining at the Tapian Pit, Defendant constructed a drainage tunnel leading to the Boac River. This drainage tunnel transported acidic rainwater to the river, resulting in the desecration of flora, fauna, and fish stocks in the river. Further, Defendant transported toxic mine tailings from the Tapian Pit to the Calancan Bay.

The Calancan Bay is a natural bay that covers a 27 square mile area at the north end of Marinduque. In 1974, Defendant, on Marcopper's behalf, applied to the National Water and Air Pollution Control Commission

("NWAPCC") for a permit to dump the Taipan Pit tailings into the bay. Defendant's partner, Marcos, ordered the NWAPCC to grant the permit. Although this permit only allowed Defendant to dispose of the tailings deep beneath the surface of the bay, Defendant began surface dumping, which caused substantial harm to the bay, its marine life, and the citizens of Marinduque.

In 1991, Defendant exhausted the ore supply in the Taipan Pit. That same year, Defendant opened the San Antonio Pit to continue mining in Marinduque. After mining commenced in the San Antonio Pit, toxic silt, a byproduct of the mining process, began to erode from the pit into the Mogpog River. To remedy this problem, Defendant constructed the Maguila-Guila Dam to trap the toxic silt before it infested the waters of the Mogpog River. The dam, however, was insufficient to contain all of the silt and the downstream wildlife continued to be affected.

In 1993, The Maguila-Guila Dam collapsed, causing a wall of toxic silt to rush into the Mogpog River. The flooding that resulted destroyed homes and rice fields and killed animals and two children. To prevent future flooding, Defendant reconstructed the dam with an overflow hole that relieves pressure during periods of heavy rainfall. This overflow hole, however, allows toxic silt to flow into the Mogpog River, causing further harm to Marinduque's environment.

Because of the foregoing damage that the Marinduque mining operations have caused, Plaintiff filed a Complaint against Defendant in the District Court of Clark County Nevada. In this Complaint, Plaintiff

alleges the following thirteen causes of action against Defendant; (1) Enforcing the Public Trust; (2) Violations of the Philippine Revised Penal Code; (3) Violations of the Philippine Revised Penal Code; (4) Violations of the Philippine Water Code; (5) Violations of the Philippine Fisheries Decree of 1975; (6) Violations of the Philippine National Pollution Control Decree of 1976; (7) violations of the Philippine National Water and Air Pollution Control Commission Act; (8) Violations of the Philippine Mining Act of 1995; (9) Negligence; (10) Public and Private Nuisance; (11) Breach of Contract (first count); (12) Breach of Contract (second count); and (13) Promissory Estoppel.[3] Defendant removed this action on October 27, 2005. The Court now determines whether it has jurisdiction over this case.

II. ANALYSIS

Federal courts are courts of limited jurisdiction. Section 1441 (a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction maybe removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441 (a) (2005). Jurisdiction in this case is premised upon a federal question under 28 U.S.C. § 1331. Federal courts may not assert federal question jurisdiction over an action unless a federal right or immunity is "an element and an essential one, of the plaintiff's cause of action." See e. g., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 11 (1983). This well-pleaded complaint rule requires that the federal question on which jurisdiction is premised "be disclosed

upon the face of the complaint, unaided by the answer." Phillips Petroleum Co. v. Texaco Inc., 415 U.S.125,127-28 (1974).

Under Section 1447(c), a district court is required to remand an action "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." 28 U.S.C. § 1447(c) (2005). This statute is strictly construed against removal jurisdiction and doubts as to the right of removal are resolved in favor of remanding the case to state court. Gaus v. Miles,_ Inc., 980 F.2d 564, 566 (9th Cir.1992); Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.2003). Because of the strong presumption against removal jurisdiction, a removing defendant bears the burden of proving, by a preponderance of the evidence, that the Court has subject matter jurisdiction over the removed action. Gaus, 980 F.2d at 566; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04 (9th Cir.1996).

In its Notice of Removal (#1), Defendant asserts that this Court has original jurisdiction over this action under 28 U.S.C. § 1331 because the action involves federal common law, including questions of international law and foreign relations.

Although there is no general federal common law, the Supreme Court has recognized that "there are enclaves of federal judge-made law which bind the States." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964). One such enclave concerns the law of international affairs and foreign relations. As the Supreme Court noted in Sabbatino, "rules of international law should not be left to divergent and

perhaps parochial state interpretations." Id. at 425. A specific example of this is the longstanding act of state doctrine, which precludes U.S. Courts from questioning the validity of actions that a foreign government takes within its own borders. Underhill v. Hernandez,168 U.S. 250, 252 (1897). "Whether a foreign state's act is given legal force in the courts of the United States is a 'uniquely federal' question directly implicating our nation's foreign affairs." Patrickson v. Dale Food Co., 251 F.3d 795, 799 (9th Cir. 2001).

Although Sabbatino resolved a choice of law issue regarding whether state or federal law applies to international law cases, the opinion is also helpful in determining whether the Court has federal-question jurisdiction over this matter. As the Ninth Circuit reasoned, "Sabbatino held that the common law of foreign relations falls outside Erie's general rule and so federal law applies. Federal common law is, of course, federal law; so if a plaintiff's claim arises under the federal common law recognized by Sabbatino, the federal courts will have jurisdiction under 28 U.S.C. § 1331." Patrickson, 251 F.3d at 800 (internal citations omitted).

The Ninth Circuit has previously applied Sabbatino to determine whether a federal court could assert federal question jurisdiction over such claims based on the federal common law of foreign relations. Patrickson, 251 F.3d at 798. Patrickson involved a class action brought by Latin American banana workers against multinational fruit and chemical companies alleged to have exposed workers to a toxic pesticide. The Ninth Circuit ultimately held that it could not assert federal question jurisdiction in that case because "nothing in

plaintiffs' complaint turn[ed] on the validity or invalidity of any act of a foreign state." Patrickson, 251 F.3d at 800. Further, the Ninth Circuit noted that "[p]laintiffs [did not] claim that any foreign government participated in such activities or that the defendants acted under the color of foreign law. The case-at least as framed by plaintiffs--- [did not] require [the court] to evaluate any act of state or apply any principal of international law." Id.

Essential to the Ninth Circuit's holding in Patrickson was the fact that the plaintiffs did not make any allegations in their complaint that would invoke the act of state doctrine. In fact, this is the issue on which the Ninth Circuit departed from its sister circuits' holdings. For example, in Republic of Philippines v. Marcos, 806 F.2d 344 (2d. Cir. 1986), the Second Circuit suggested that federal question jurisdiction could be premised on the fact that a case may affect foreign relations regardless of whether federal law is raised by the plaintiff's complaint. Id. at 354. The Ninth Circuit rejected this proposition, explaining that Sabbatino created an exception only to Erie, and not to the well-pleaded complaint rule. Patrickson, 251 F.3d at 801-02. Thus, under Sabbatino and Patrickson, the Court must determine that the allegations in Plaintiff's Complaint require the Court to evaluate any act of state or apply any principal of international law before it can assert jurisdiction.[4]

In its Complaint, Plaintiff alleges numerous actions taken by the Philippine government to facilitate Defendant's alleged desecration of its environment. First, Plaintiff alleges that the ex-president of the Philippines, Ferdinand Marcos, overturned a

Presidential Proclamation, allowing Defendant to commence mining beneath Marinduque's forest reserve. (Original Complaint (attached to Defendant's Notice of Removal (#1)) at Par. 40-41). Second, Plaintiff alleges that Marcos and, subsequently, the Presidential Commission on Good Government owned 49 percent of the shares of Marcopper, Defendant's subsidiary mining company in Marinduque. Id. at Par. 42.Third, Plaintiff alleges that Marcos ordered the NWAPCC to issue permits that allowed Defendant to dump toxic waste into the Calancan Bay. Id. at Par. 65. Fourth, Plaintiff alleges that when the NWAPCC later attempted to restrict the amount of dumping into Calancan Bay, Marcos removed the constraints and ordered the NWAPCC to never again impose restrictions on Defendant's ability to dump mine tailings into the Calancan Bay. Id. at Par. 154. Finally, Plaintiff alleges that in 1988, after Marcos was overthrown, the Pollution Adjudication Board ("PAB"), a Philippine government agency, ordered Defendant to cease and desist its dumping into Calancan Bay. Defendant sought to undermine this order by appealing to the newly elected Philippine President, Corazon Aquino. Aquino ultimately complied with Defendant's request and enjoined the PAB from enforcing its cease and desist order. Id. at 158-162. Thus, Plaintiff's Complaint is replete with allegations regarding the Philippine Government's activities, which contributed to the environmental harm that Plaintiff has suffered.

Because the allegations in Plaintiff's Complaint require this Court to evaluate the acts of a foreign state, this Court has federal question jurisdiction over this action. See Patrickson, 251 F.3d at 800.

III. CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED that Plaintiff's Motion for Order Requiring Defendant to Show Cause Why This Action Should Not Be Remanded to State Court (#94) is denied.

DATED: This 6th day of November, 2006.

Footnotes

1 In 1986, after Marcos was overthrown, the Presidential Commission on Good Government seized his Marcopper shares, and Marcopper continued its mining operations in Marinduque.

2 This percentage of shares was the maximum that a foreign investor may own in a Philippine mining corporation.

3 Since this case was removed, Plaintiff has twice amended its original Complaint to add additional facts and alter its causes of actions. For purposes of determining whether removal is proper, however, the Court analyzes jurisdiction on the basis of the pleadings filed at the time of removal without reference to subsequent amendments. See e.g,, Sparta Surgical Corp. v, NASD, 159 F.3d 1209, 1213 (9th Cir. 1998).

4 As the Ninth Circuit has noted, "[a]l though the act of state doctrine generally serves as a defense, it can also be used affirmatively as the basis of a claim." Patrickson, 251 F.3d at 800 n.2.

Excerpt from Placer Dome Inc. and Barrick Gold Corporation's Response Brief filed in the Ninth Circuit

In short, after the Supreme Court decided Sinochem, the district court never waivered from its view that it could dismiss this case on forum on conveniens without deciding subject matter jurisdiction. [p.52]

Defendants have never contended that a U.S. federal court should assert jurisdiction over the present case simply because a foreign government has an interest in the case.[p.58]